Supreme Court, U.S.
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No. 97-1488

In the Supreme Court of the United States

OCTOBER TERM, 1997

KENNETH M. ZERAN,

Petitioner,

v.

AMERICA ONLINE, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

OPPOSITION OF AMERICA ONLINE, INC. TO PETITION FOR A WRIT OF CERTIORARI

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May 21, 1998

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QUESTIONS PRESENTED

1. Whether the Court of Appeals properly applied settled rules of statutory construction in determining that 47 U.S.C. § 230(c)(1), which commands that "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider," barred Petitioner's cause of action, which sought to hold Respondent America Online, Inc., a provider of an interactive computer service, liable for allegedly defamatory messages provided by a third party.

2. Whether the Court of Appeals properly applied settled law concerning the temporal reach of federal statutes in concluding that 47 U.S.C. § 230(d)(3), which provides in relevant part that "[n]o cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section," required application of 47 U.S.C. § 230(c)(1) to Petitioner's cause of action, which Petitioner did not file until after the statute was enacted and became effective.

RULE 29.6 STATEMENT

Pursuant to Supreme Court Rule 29.6, Respondent America Online, Inc. states as follows:

America Online, Inc. has no parent companies. The following entities are non-wholly owned subsidiaries of America Online, Inc.: AOL America Online (Deutschland) GmbH; AOL Bertelsmann Management GmbH; AOL Bertelsmann Online Europe GmbH; AOL Bertelsmann Online France S.N.C.; AOL Bertelsmann Online GmbH & Co KG; AOL Bertelsmann Online Limited; AOL Bertelsmann Online Services; AOL Bertelsmann Online (UK Management) Limited; AOL Holding GmbH; AOL (Japan) Inc.; CIS Holding BV; CompuServe Interactive Services (Deutschland) GmbH & Co. KG; CompuServe Interactive Services France SNC; CompuServe Interactive Services Management Deutschland GmbH; CompuServe Interactive Services Nederland CV; CompuServe Interactive Services Schweiz GmbH; CompuServe Management BV; CSi CompuServe Interactive Services UK Digital City, Inc.; Digital Marketing Services, Inc.; and Thrive J.V.

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Respondent America Online, Inc ("AOL"), defendant below, respectfully opposes the Petition for a Writ of Certiorari for the reasons set forth herein.

STATUTORY PROVISIONS INVOLVED

The statute at issue in this case is section 509 of the Telecommunications Act of 1996, now codified at 47 U.S.C.A. § 230 (West Supp. 1997) ("Section 230"). Because Petitioner failed to set out the statute in full in his Petition, the entire text of the statute is reprinted in the Appendix to this Opposition.

COUNTERSTATEMENT

1. America Online, Inc. AOL operates an interactive computer service over which millions of subscribers disseminate and receive information by means of computer modem connections to AOL's computer network. Pet. App. A-3. Much of the information transmitted over AOL's service originates with AOL subscribers, who may transmit information over AOL's service through a variety of methods, including electronic mail (private electronic communications addressed to specific recipients) and message boards (online areas where subscribers may post messages that are then generally available for review by other subscribers). *Id.*

2. The Complaint. According to the Complaint,[1/] on April 25, 1995, an unidentified person using the screen name

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[1/] Because the courts below adjudicated this case on the basis of AOL's motion for judgment on the pleadings, the allegations in the complaint were accepted as true. By reciting Zeran's allegations, AOL does not concede their truth.

"Ken ZZ03"[2/] posted on an AOL message board a message advertising "Naughty Oklahoma T-Shirts" with offensive slogans referring to the bombing of the federal building in Oklahoma City. *Id.* The message indicated that anyone interested in the t-shirts should contact "Ken" and listed a phone number that belonged to Zeran's business, which he operated out of his home. *Id.* Zeran allegedly began receiving derogatory and threatening phone calls as a result of the posted message. *Id.* After Zeran learned of the message from the phone calls, he allegedly informed AOL that the posting was a hoax and asked that it be removed. *Id.* at A-3 to A-4.

Shortly after being contacted by Zeran, AOL deleted the posted message. *Id.* at A-24. But over the next several days, an unidentified person using two slightly different screen names posted three similar messages. *Id.* at A-24 to A-25. During this period, Zeran allegedly telephoned AOL on a number of occasions to request removal of the messages. *Id.* He allegedly continued to receive unwanted calls about the messages. *Id.*

On May 1, 1995, someone sent a copy of one of the posted messages to an announcer for radio station KRXO in Oklahoma City. *Id.* at A-4. That day, KRXO allegedly aired a

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[2/] A "screen name" is a unique set of characters (letters or numbers) that identifies a person or entity that originates a message or posting transmitted via an interactive computer service or the Internet. AOL permits each of its subscribers to have as many as five different screen names of no more than ten characters each. It is commonplace for an AOL subscriber's screen name(s) to be different from his or her real name.

broadcast in which the announcer read out parts of the message, gave Zeran's business phone number over the air, and encouraged listeners to call the number. *Id.* As a result of the broadcast, Zeran allegedly received death threats and other calls with violent language from Oklahoma City. *Id.*

On January 4, 1996, Zeran filed suit in federal district court in Oklahoma against the owner of radio station KRXO. *Id.* at A-5. In that suit, he alleged that the station's broadcast in which the announcer read aloud portions of one of the posted messages constituted defamation, false light invasion of privacy, and intentional infliction of emotional distress. The district court in that case recently granted summary judgment in favor of KRXO's owner on each count of Zeran's complaint.[3/]

On April 23, 1996, several months after suing KRXO's owner and two months after enactment of 47 U.S.C. § 230, Zeran filed this separate action against AOL in the same Oklahoma district court. *Id.*[4/] This suit sought recovery for alleged reputational injury and emotional distress caused by the allegedly defamatory messages. Zeran alleged that, upon notice that the first of the messages was a hoax, AOL had a duty to take reasonable care not only to remove that message, but also to employ some electronic screening mechanism to

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[3/] *Zeran v. Diamond Broad., Inc.*, No. CIV-96-0008-T (W.D. Okla. Dec. 29, 1997), *appeal docketed*, Nos. 98-6092, 98-6094 (10th Cir. Mar. 6, 1998).

[4/] Zeran's suit against AOL was subsequently transferred to the district court for the Eastern District of Virginia pursuant to 28 U.S.C. § 1404(a). *See* Pet. App. A-5.

prevent the posting of any subsequent messages containing Zeran's first name or telephone number. *Id.* at A-24, A-26.

After filing its Answer, AOL moved for judgment on the pleadings pursuant to Fed. R. Civ. P. 12(c) on the ground that 47 U.S.C. § 230(c)(1), which prohibits treating interactive service providers such as AOL as the "publisher or speaker" of third-party content, barred Zeran's action. *Id.* at A-26.

3. The Decisions Below. On March 21, 1997, the District Court granted AOL's motion for judgment on the pleadings. *Id.* at A-21 to A-46. On appeal, the United States Court of Appeals for the Fourth Circuit affirmed. *Id.* at A-1 to A-18. The Court of Appeals held that Section 230(c)(1) precluded suits that "would make service providers liable for information originating with a third-party user of the service." *Id.* at A-6 to A-16. The court specifically rejected Zeran's claim that Section 230(c)(1) did not apply to "distributors" of information, holding that under the general common-law meaning of "publisher," distributor liability is "merely a subset, or a species, of publisher liability, and is therefore also foreclosed by § 230." *Id.* at A-10.

The courts below also rebuffed Zeran's argument that applying Section 230 to his suit would have an impermissible retroactive effect. *Id.* at A-16 to A-18. Applying this Court's familiar *Landgraf* test,[5/] the Court of Appeals found that Section 230's command that "[n]o cause of action may be brought" under inconsistent state law "applies by its plain terms to complaints brought after [Section 230] became

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5/ *Landgraf v. USI Film Prods.*, 511 U.S. 244 (1994).

effective," regardless of when the underlying events occurred. *Id.* at A-16.

SUMMARY OF ARGUMENT

None of the reasons that this Court typically considers as favoring the exercise of its discretionary jurisdiction is present here, and there are multiple reasons that affirmatively militate against granting the Petition. First and foremost, rather than being in conflict with any other decision, the decision below is the *first* (and so far *only*) decision by any appellate court construing 47 U.S.C. § 230, and the Court of Appeals reached the same result as *all* of the reported decisions to date by the few trial courts that have construed the relevant provisions of this statute.

Moreover, while this case concerns the relatively new medium of interactive computer services, the Petition itself presents no legal issue of national importance that would warrant the exercise of certiorari jurisdiction in the absence of a conflict with other decisions. The Petition presents nothing more than ordinary issues of statutory construction of the sort that the courts of appeals resolve every day. And these issues are narrow in scope, as illustrated by the fact that, in the more than two years since the statute was enacted, there have been only three other cases in which trial courts have construed 47 U.S.C. § 230(c)(1), and only one other case in which a trial court has determined the statute's temporal reach.

Nor does anything about the nature of the decision below warrant further review by this Court. The Court of Appeals faithfully adhered to well-settled principles of statutory construction and reached a decision that accords fully not only with the plain language of the statute, but also with Congress's

policy objectives as explicitly stated in the statute's "[f]indings" and "[p]olicy" preamble. Petitioner's disagreement with the decision below is, at bottom, a disagreement with the basic policy choice that Congress expressed in the statute. That is not a proper basis for granting further review of the decision.

ARGUMENT

I. THE COURT OF APPEALS' RULING THAT 47 U.S.C. § 230(c)(1) BARRED PETITIONER'S CLAIM DOES NOT MERIT FURTHER REVIEW.

Congress enacted 47 U.S.C. § 230 in order to eliminate uncertainties in the law governing whether providers of interactive computer services, such as AOL, could be liable for harms resulting from the dissemination of tortious content that other persons or entities create and transmit using such services.[6/] In Section 230(c)(1), Congress provided:

> No provider or user of an interactive computer service shall be treated as the *publisher or speaker* of any information provided by another information content provider. (emphasis added)

[6/] Section 230 is part of the Communications Decency Act ("CDA"), two provisions of which this Court struck down on First Amendment grounds last Term. *Reno v. ACLU*, 117 S. Ct. 2329 (1997) (holding 47 U.S.C. § 223(d) and most of 47 U.S.C. § 223(a) unconstitutional). The invalidation of these other CDA sections did not affect Section 230. *See* 47 U.S.C. § 608 ("If any provision of this [Act] . . . is held invalid, the remainder of the [Act] . . . shall not be affected thereby."); *Reno*, 117 S. Ct. at 2350-51 (holding that portion of Section 223 not implicated by First Amendment ruling remains intact).

The court below ruled that this provision bars the imposition of liability on AOL for injury allegedly caused by a third party's defamatory or otherwise tortious messages. Specifically, it held that making AOL liable would impermissibly treat AOL (which Petitioner concedes is a "provider of an interactive computer service," Pet. App. A-6 n.18) as the "publisher or speaker" of the allegedly tortious messages (which Petitioner concedes are "information provided by another information content provider," *id.*).

The Court of Appeals' construction of the term "publisher or speaker" as used in Section 230(c)(1) was based on well-established principles of statutory interpretation and is fully consistent with the decision of every other court that has construed the term. This holding does not merit further review by this Court.

A. The Decision Below Does Not Conflict With the Ruling of Any Other Court.

As even Petitioner acknowledges, the Court of Appeals' decision raises no conflict with any decision in any court. The decision below was the first—and thus far only—appellate decision involving the interpretation of Section 230. In Petitioner's words, this "is the first case interpreting section 230(c) and the interplay between sections 230(c) and 230(d)," and accordingly, "[n]o case involving [Section 230] has yet reached this stage." Pet. at 17, 19. Thus, by definition, the

decision raises no conflict with another decision of a federal court of appeals or state court of last resort. Sup. Ct. R. 10(a).[7]

The decision below does not even conflict with any decision in the federal or state trial courts. In fact, we are aware of only three other decisions concerning the interpretation of Section 230(c)(1), all of which reached the same conclusion as the courts below in this case. *See Blumenthal v. Drudge*, No. CIV. A. 97-1968 PLF, 1998 WL 195979, at **3-5 (D.D.C. Apr. 22, 1998) (Section 230(c)(1) "effectively immunize[s] providers of interactive computer services from civil liability in tort with respect to material disseminated by them but created by others"); *Doe v. America Online, Inc.*, No. CIV. CL 97-631 AE, 1997 WL 374223, at **2-3 (Fl. Cir. Ct. June 26, 1997) ("Making AOL liable for [a third-party's] chat room communications would treat AOL as the 'publisher or speaker' of those communications" in violation of Section 230(c)(1).); *Aquino v. Electriciti Inc.*, 26 Media L. Rep. (BNA)

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[7] Ironically, Petitioner repeatedly touts the absence of other appellate decisions construing Section 230 as if that were a reason to grant the Petition. *See, e.g.*, Pet. at 17 ("This case presents the Court the *first* opportunity to interpret the limits of the immunity granted online service providers." (emphasis added)); *id.* at 21 ("The Court should grant certiorari to . . . resolve these issues of *first impression* concerning § 230 of the CDA." (emphasis added)). This fundamentally misapprehends this Court's approach to certiorari review, which generally disfavors review of issues for which there has been little or no fermentation in the lower courts. *See, e.g.*, *McCray v. New York*, 461 U.S. 961, 963 (1983) (Stevens, J.) (concluding that, particularly given the absence of conflict, certiorari should be denied to allow "further study" of the issue in lower courts).

1032, 1032 (Cal. Super. Ct. Sept. 23, 1997) (dismissing tort claims on the basis of Section 230(c)(1)).[8/] Thus, far from creating a conflict that might require this Court's attention, the decision below simply exemplifies the unanimity of the lower courts in their interpretation of Section 230(c)(1).

B. The Court of Appeals' Decision Was a Correct and Straightforward Application of Settled Principles of Statutory Interpretation.

The sole legal issue Petitioner raises with respect to the operation of Section 230(c)(1) is the meaning of the term "publisher or speaker." The Court of Appeals, relying on settled principles of statutory construction, determined that holding AOL liable for third-party content would treat it as the "publisher" of that content in contravention of Section 230(c)(1). Petitioner's contention that the Court of Appeals

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[8/] The only other case of which we are aware in which a court has construed any of Section 230's operative provisions is *Mainstream Loudoun v. Loudoun County Library*, No. CIV. A. 97-2049-A, 1998 WL 164330 (E.D. Va. Apr. 7, 1998). In that case, the United States District Court for the Eastern District of Virginia, the same court that issued the original decision in this case, held that another part of Section 230—namely 47 U.S.C. § 230(c)(2)—does not bar a suit against a public library challenging on constitutional grounds the library's content-based restrictions on Internet access. The court in that case appropriately looked to the decision of the Court of Appeals in this case for guidance concerning the overarching purposes of Section 230. The district court decision in *Mainstream Loudoun*, interpreting a different provision of Section 230, does not conflict with the decision of the Court of Appeals below.

committed an error on this point does not warrant further review.

Because Section 230 does not contain an explicit definition of the term "publisher," the court below properly turned to the common law to determine its meaning. *See, e.g., Gilbert v. United States*, 370 U.S. 650, 655 (1962) ("[I]n the absence of anything to the contrary it is fair to assume that Congress use[s a] word in [a] statute in its common-law sense."). As the Court of Appeals explained, under the common law, "both the negligent communication of a defamatory statement and the failure to remove such a statement when first communicated by another party—each alleged by Zeran here under a negligence label—constitute publication." Pet. App. A-10 (citing Restatement (Second) of Torts § 558(b) (1977)); *see also* Restatement § 577 ("One who intentionally and unreasonably *fails to remove* defamatory matter that he *knows to be exhibited* on land or chattels in his possession or under his control is subject to liability for its *continued publication*." (emphasis added)). Accordingly, in the context of torts such as defamation, distributors are merely a type of publisher: "Those who are in the business of making their facilities available to disseminate the writings composed, the speeches made, and the information gathered by others may also be regarded as participating to such an extent in making the . . . information available to others as to be regarded as publishers." W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* 803 (5th ed. 1984). Indeed, basic hornbook law provides that an entity may be liable for harm caused by a defamatory statement if and only if the entity "published" the statement. Restatement (Second) of Torts § 558 (1977) (essential elements of any defamation action include both "an unprivileged *publication* to a third

party" and "fault amounting at least to negligence on the part of the *publisher*"(emphasis added)).

In the face of this unequivocal common law background, Petitioner essentially concedes that holding a distributor such as AOL liable for third-party content would treat it as a "publisher" under the common law usage of the term. *See* Pet. at 12. He claims, however, that Congress intended to implement a "narrow definition" of the term that did not include distributors, a definition that he alleges is embodied in two earlier trial court decisions, *Cubby, Inc. v. CompuServe Inc.*, 776 F. Supp. 135 (S.D.N.Y. 1991) and *Stratton-Oakmont, Inc. v. Prodigy Servs. Co.*, 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995). Pet. at 12. The court below considered and rejected this argument, correctly concluding that neither *Stratton-Oakmont* nor *Cubby* supports the proposition that holding a distributor liable for disseminating defamatory content would not treat the distributor as the "publisher" of that content.[9/]

As the Court of Appeals observed, although both *Stratton-Oakmont* and *Cubby* recognized a legal distinction between publishers and distributors, "this distinction signifies only that different standards of liability may be applied *within* the larger

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[9/] The courts in both *Blumenthal* and *Doe* expressly considered and rejected the very same argument that Petitioner raises here. *See Blumenthal*, 1998 WL 195979, at *7 ("Any attempt to distinguish between 'publisher' liability and notice-based 'distributor' liability and to argue that Section 230 was only intended to immunize the former would be unavailing."); *Doe*, 1997 WL 374223, at *3 ("[T]o hold AOL liable for negligently 'distributing' [third-party content] . . . would treat AOL as the 'publisher or speaker' of those statements.").

publisher category, depending on the specific type of publisher concerned." Pet. App. A-11. In particular, those decisions merely identified the well-established constitutional and common law principle that the First Amendment provides a "deeply rooted" protection for distributors such as interactive service providers and that, as a result, such a provider may be held liable as the publisher of defamatory third-party content only if it "knew or should have known" of the defamation. *Cubby*, 776 F. Supp. at 139-41 (citing *Smith v. California*, 361 U.S. 147, 152-53 (1959)); *Stratton-Oakmont*, 1995 WL 323710, at *3. But while those decisions describe the different standards of liability for publishers and distributors, they "do not . . . suggest that distributors are not also a type of publisher for purposes of defamation law." Pet. App. at A-11 to A-12.

Having applied well-established principles of statutory interpretation to determine that holding AOL liable would treat it as a "publisher" in contravention of Section 230(c)(1), the Court of Appeals confirmed its conclusion by analyzing whether such a meaning was consistent with and would further the purposes of Section 230. Pet. App. at A-12 to A-14. This approach, far from being a "manifest[] depart[ure] from any accepted rule of judicial construction and [an] inva[sion of] the province of the legislature," Pet. at 13, was again the method required by accepted principles of statutory interpretation. *See, e.g., Crandon v. United States*, 494 U.S. 152, 158 (1990) ("In determining the meaning of the statute, we look not only to the particular statutory language, but to the design of the statute as a whole and to its object and policy.").

Determining the purposes of Section 230 was a straightforward task: Congress explicitly stated its goals in the "Findings" and "Policy" statement set out in the preamble of the statute.

47 U.S.C. §§ 230(a)-(b). These introductory sections—which Petitioner almost completely ignores—are the type of clear and reliable evidence of Congress' purposes and goals on which this Court routinely relies.[10/] The preamble announces, *inter alia*, congressional findings that "interactive computer services offer a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity" and that these services have "flourished, to the benefit of all Americans, *with a minimum of government regulation*." 47 U.S.C. §§ 230(a)(3)-(4) (emphasis added). The preamble further declares that it is "the policy of the United States . . . to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, *unfettered by Federal or State regulation*." *Id.* § 230(b)(2) (emphasis added). Viewed in the context of the whole of Section 230, these declarations reflect Congress's view that a legal regime under which interactive computer service providers could face tort liability for dissemination of content produced by others inevitably would hurt the development of an emerging communications medium that obviously holds great promise.

At the same time, Section 230's preamble reflects that Congress recognized the need to deter and punish truly harmful online speech and chose to do so by strengthening enforcement of federal criminal laws against the actual wrongdoers who originate such speech. The preamble declares that it is the

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[10/] *See, e.g., United States v. Smith*, 499 U.S. 160, 177 (1991); *Friedman v. Rogers*, 440 U.S. 1, 13 n.12 (1979); *Tilton v. Richardson*, 403 U.S. 672, 678 (1971); *American Trucking Ass'ns. v. United States*, 364 U.S. 1, 6 (1960).

"policy of the United States . . . to ensure vigorous enforcement of Federal criminal laws to deter and punish trafficking in obscenity, stalking, and harassment by means of computer." *Id.* § 230(b)(5). Thus, Congress made the policy decision to deter tortious online speech not by punishing the intermediary—as Petitioner's suit would do—but by strengthening the enforcement of legal remedies against the culpable source of the unlawful content.

Having recited these congressional purposes, the court below correctly found that the rule of law advocated by Petitioner—that an interactive computer service should be liable for injury caused by a series of false third-party messages once it is notified that one of its millions of users has posted one such message—would undermine Congress' goals. Such a rule would run directly counter to the express statutory policy that such services be "unfettered by Federal or State regulation." 47 U.S.C. § 230(b)(2). Moreover, as the Court of Appeals accurately discerned, Pet. App. A-13 to A-14, it would also have the perverse effect of undermining the statute's clear objective to remove disincentives for interactive computer services voluntarily to engage in self-regulatory activities designed to restrict the availability of material that they consider to be objectionable. As the Court of Appeals explained, under the rule advocated by Petitioner, "[a]ny efforts by a service provider to investigate and screen material posted on its service would only lead to notice of potentially defamatory material more frequently and thereby create a stronger basis for liability. Instead of subjecting themselves to further possible lawsuits, service providers would likely eschew any attempts at self-regulation." Pet. App. A-13 to A-14.

Furthermore, as the Court of Appeals recognized, notice-based liability would have a chilling effect on speech over interactive services, contrary to Congress' intent that these services continue to flourish as "a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity." 47 U.S.C. § 230(a)(4). Under Petitioner's theory, once a service provider received notice of a possibly tortious message, it would face potential liability and have to make a "careful yet rapid investigation of the circumstances surrounding the posted information, a legal judgment concerning the information's defamatory character, and an on-the-spot editorial decision whether to risk liability by allowing the continued publication of that information." Pet. App. A-13. Even assuming that were practical given the sheer number of postings on interactive computer services, such a rule would result in the suppression of speech: "Because service providers would be subject to liability only for the publication of information, and not for its removal, they would have a natural incentive simply to remove messages upon notification, whether the contents were defamatory or not." *Id.* Such results would frustrate Congress' intent.

II. THE COURT OF APPEALS' HOLDING THAT 47 U.S.C. § 230 APPLIES TO THIS CASE EVEN THOUGH THE EVENTS ALLEGED IN THE COMPLAINT PRE-DATE ITS ENACTMENT DOES NOT MERIT FURTHER REVIEW.

Petitioner also challenges the Court of Appeals' application of this Court's *Landgraf* test for determining whether Section 230 governs this case, which, though it involves events pre-dating the enactment of Section 230, was filed after the

date of enactment. The court below held that Section 230 applies in these circumstances based on the plain meaning of the second sentence of Section 230(d)(3), which provides:

> No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section.

The Court of Appeals' decision on this point does not merit further review for at least three reasons. First, this ruling represents the first and (so far) only appellate decision concerning this issue and is identical to the trial court ruling in the only other case in which this issue has been decided. Second, the decision raises no issue of national importance, particularly given that in the more than two years Section 230 has been law, this case is one of only two of which we are aware that have raised any issue concerning the temporal reach of Section 230. Third, the court below, following this Court's precedents, applied the undisputedly appropriate legal framework to reach the correct result.

A. The Decision Below Is Not in Conflict with the Decision of Any Other Court.

As with the Court of Appeals' construction of Section 230(c)(1), its decision concerning the temporal reach of Section 230 creates no conflict with the decision of any other court. Aside from the present case, the issue has not been decided in any federal court of appeals or state court of last resort. Indeed, the only other decision to date concerning Section 230's temporal reach was a decision last year by a state trial-level court, *Doe v. America Online, Inc.*, No. CIV. CL 97-631 AE, 1997 WL 374223 (Fla. Cir. Ct. June 26, 1997). Citing the federal district court's carefully-reasoned decision in this

case, that court also ruled that the plain language of Section 230(d)(3) required applying the statute to all cases brought after its enactment, regardless of when the underlying events occurred. *See id.* at *4. Accordingly, this case presents no conflict for this Court to resolve.

B. Section 230's Temporal Reach Is Not an Issue of National Importance.

The question of whether Section 230 controls cases filed after the statute was enacted and became effective but involving some events that predate enactment is particularly unworthy of further review because, even assuming *arguendo* that the decision were wrong, its implications are extremely narrow. Indeed, there is every reason to believe that the Court of Appeals' ruling on this issue will be significant to no one other than the Petitioner himself and, at most, a small handful of other current or prospective plaintiffs. *See generally Rice v. Sioux City Cemetery*, 349 U.S. 70, 79 & n.2 (1955) (certiorari is inappropriate where "the question [is] of importance merely to the litigants and [does] not present an issue of immediate public significance").

As already noted, since Section 230 was enacted and became effective on February 8, 1996, this case and *Doe v. America Online*, which also involved only one plaintiff, are the only cases of which we are aware in which any court has considered whether Section 230 applies to all cases filed after it was enacted, regardless of when the events at issue took

place.[11/] We are not aware of any other case that has been filed against AOL or any other interactive computer service in which this issue has arisen or may arise.

Moreover, given that Section 230 has been law for more than two years, few, if any, additional cases are likely to be filed that will implicate the applicability of Section 230 to pre-enactment events. Indeed, even assuming that other possible plaintiffs have a potential claim implicating application of Section 230 and arising out of facts that predate its enactment, their claims are likely to be barred on other threshold grounds such as statutes of limitations, which are often two years or less for torts such as defamation.[12/]

Finally, the decision below concerning the temporal reach of Section 230 is unlikely to have any significant ramification

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[11/] One other case now pending in a state court may present the related, but distinct, question of whether Section 230 controls a case that was already pending when the statute was enacted. *Lunney v. Prodigy Servs. Co.*, No. 21886/94 (N.Y. Sup. Ct. Jan. 13, 1998), *appeal docketed*, No. 97-07342 (N.Y. App. Div. Jan. 29, 1998). In that case, the New York trial court denied defendant Prodigy's motion for summary judgment on solely State procedural grounds, without even construing any part of Section 230, much less determining its temporal reach. *Id.*

[12/] For example, all but six states (Arkansas, Massachusetts, New Hampshire, New Mexico, Rhode Island, and Vermont) have a statute of limitations period for defamation actions that is two years or less. *See* Robert D. Sack & Sandra S. Baron, *Libel, Slander, and Related Problems* 835 (2d ed. 1994 & Supp. 1997).

outside the limited context of cases in which Section 230 is raised as a defense. As discussed in greater detail in the next section, the decision below broke no new ground, but rather applied well-settled retroactivity jurisprudence to the particular language of 47 U.S.C. § 230(d)(3). Because the Court of Appeals' analysis was primarily based on the statute's plain language, its ruling will have little or no relevance to cases involving other statutes.

Given the extremely circumscribed impact of the decision below, this case does not present any important question of federal law and does not warrant further review by this Court.

C. The Decision Below, Rather Than Conflicting With This Court's Retroactivity Jurisprudence, Simply Involved a Straightforward Application of the Analytical Framework Articulated in This Court's Prior Decisions.

Although Petitioner claims that the decision below somehow conflicts with this Court's retroactivity decisions, the Court of Appeals faithfully applied this Court's framework for analyzing the temporal reach of federal statutes and correctly concluded that, under that framework, Section 230 governs Petitioner's claim. Moreover, Petitioner's entire retroactivity attack on the opinion below concerns a single paragraph in the decision that was not even necessary to the court's decision, further obviating any need for further review of this case.

In both *Landgraf* and *Hughes Aircraft Co. v. United States ex rel Schumer*, 117 S. Ct. 1871 (1997), this Court held that the first step in a retroactivity analysis is "to determine whether Congress has expressly prescribed the statute's proper reach," in which case that prescription governs. *Landgraf*, 511 U.S. at

280. Despite Petitioner's inexplicable assertion that AOL does not rely on this step of the analysis, Pet. at 15 n.10, the Court of Appeals properly concluded that "[t]his case can be resolved at this first step." Pet. App. A-17. Petitioner's utter failure even to address this step of the analysis is reason enough to deny certiorari on the issue of Section 230's temporal reach.

Section 230(d)(3) expressly provides that "[n]o cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section." 47 U.S.C. § 230(d)(3). This clear language led the Court of Appeals to hold that "Section 230 applies by its plain terms to complaints brought after the CDA became effective," even if the events at issue occurred before the statute's enactment. Pet. App. A-16. Congress could not have expressed its intent more clearly: from the date of Section 230's enactment (February 8, 1996), *no* action may be filed and *no* liability may be imposed under any State or local law inconsistent with Section 230, regardless of when the underlying events occurred. Congress' "use of . . . absolute language" left no room for courts to determine whether the statute should apply only to some cases filed after its enactment. *Lindh v. Murphy*, 117 S. Ct. 2059, 2064 n.4 (1997). Thus, because Petitioner's suit was filed after enactment of Section 230, a straightforward interpretation of Section 230(d)(3) requires the application of Section 230 to this case.

Indeed, as the Court of Appeals noted, "it is doubtful that a retroactivity issue is even presented here." Pet. App. A-16. Section 230(d)(3) addresses only conduct related to litigation—the bringing of a lawsuit and the imposition of liability. Because Petitioner did not file his complaint until after Section 230 was enacted and became effective, "the statute's applica-

tion in this litigation is in fact prospective." *Id.*; *see also Vernon v. Cassadaga Valley Cent. Sch. Dist.*, 49 F.3d 886, 889-90 (2d Cir. 1995) (statute applied prospectively because it "applied to conduct that occur[red] after the statute's enactment—plaintiff's filing of the complaint—not the defendant's allegedly unlawful acts."); *St. Louis v. Texas Worker's Compensation Comm'n*, 65 F.3d 43, 46 (5th Cir. 1995) (same).

Although the Court of Appeals recognized that its conclusion that Congress had clearly expressed its intent that Section 230 apply to all suits brought after its enactment resolved Petitioner's retroactivity claim, it briefly noted that Petitioner's argument would in any case also fail under the second prong of the *Landgraf* test. Pet. App. A-18. Petitioner's *entire* argument on retroactivity is directed to this brief discussion by the Court of Appeals. *See* Pet. at 14-17, 21-23. But, given the Court of Appeals' ruling as to the clear intent of the statute, its examination of the second prong of the *Landgraf* test was not even necessary for its decision. Thus, even if this Court believed that the court below had erred in its application of the second step of the *Landgraf* framework, this case would not present a suitable vehicle for review of that issue.

In any case, the Court of Appeals was correct when it determined that, even in the absence of clear Congressional intent, Section 230 would apply to this case because doing so would not have an impermissible retroactive effect. *Landgraf*, 511 U.S. at 280. A law has retroactive effect only when its application to pre-enactment events would be unfair because a party has relied upon the pre-existing law in planning his or her conduct. As the *Landgraf* Court explained, "[e]lementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their

conduct accordingly." *Landgraf*, 511 U.S. at 265. In other words, the presumption against retroactivity is designed to avoid the unfairness of changing the legal rules when a person has engaged in conduct with an expectation of the probable legal consequences.

As the Court of Appeals concluded, however, "Zeran cannot point to any action he took in reliance on the law prior to § 230's enactment." Pet. App. A-18. Clearly, his alleged actions in responding to the messages on AOL's system by complaining to AOL were not premised in any way on existing legal rules. Indeed, he cannot even claim that he filed suit against AOL in reliance on pre-Section 230 law because the statute was enacted before he brought suit. The only "reliance interest" Petitioner claims—or can claim—is that he relied on his understanding of that law as the basis for this suit.[13] The unfairness to which Petitioner points is not any change in the

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[13] Petitioner's list of the six ways he "repeatedly manifested his reliance upon settled case law" only demonstrates his lack of any cognizable reliance. Pet. at 21-23. The second item on his list concerns actions taken by AOL, not Petitioner. The third and sixth are merely factual statements that the original party who posted the messages remains unidentified and that the events at issue occurred prior to enactment of Section 230. Nothing in the Complaint indicates that Petitioner's notification of AOL when he first learned of the postings was based in any way on reliance on any rule of law. The remaining two items on Petitioner's list concern litigation decisions (such as bringing suit) that would apply in any case raising retroactivity issues and therefore cannot be the type of conduct that the presumption against retroactivity protects.

consequences of his own past actions, but an alleged unfairness of not having a claim against AOL.

But that is not the type of "reliance" or "unfairness" the presumption against retroactivity protects. After all, courts often apply statutes to suits involving pre-enactment events even though the effect is to eliminate the claim upon which the plaintiff was relying to seek redress for alleged wrongs. As Justice Scalia observed in *Landgraf*, the general rule is that a statute eliminating jurisdiction is applied to cases involving pre-enactment events, even though doing so "can deny a litigant a forum for his claim entirely." *Landgraf*, 511 U.S. at 292-93 (Scalia, J., concurring).

Thus, the decision below concerning whether Section 230 applied to this case raises no significant legal issue worthy of review. The Court of Appeals unquestionably applied the appropriate legal test and reached the correct result.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX

47 U.S.C. § 230. PROTECTION FOR PRIVATE BLOCKING AND SCREENING OF OFFENSIVE MATERIAL.

(a) FINDINGS.—The Congress finds the following:

(1) The rapidly developing array of Internet and other interactive computer services available to individual Americans represent an extraordinary advance in the availability of educational and informational resources to our citizens.

(2) These services offer users a great degree of control over the information that they receive, as well as the potential for even greater control in the future as technology develops.

(3) The Internet and other interactive computer services offer a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity.

(4) The Internet and other interactive computer services have flourished, to the benefit of all Americans, with a minimum of government regulation.

(5) Increasingly Americans are relying on interactive media for a variety of political, educational, cultural, and entertainment services.

(b) POLICY.—It is the policy of the United States—

(1) to promote the continued development of the Internet and other interactive computer services and other interactive media;

(2) to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation;

(3) to encourage the development of technologies which maximize user control over what information is received by

individuals, families, and schools who use the Internet and other interactive computer services;

(4) to remove disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict their children's access to objectionable or inappropriate online material; and

(5) to ensure vigorous enforcement of Federal criminal laws to deter and punish trafficking in obscenity, stalking, and harassment by means of computer.

(c) PROTECTION FOR "GOOD SAMARITAN" BLOCKING AND SCREENING OF OFFENSIVE MATERIAL.—

(1) TREATMENT OF PUBLISHER OR SPEAKER.—No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.

(2) CIVIL LIABILITY.—No provider or user of an interactive computer service shall be held liable on account of—

(A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or

(B) any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph (1).

(d) EFFECT ON OTHER LAWS.—

(1) NO EFFECT ON CRIMINAL LAW.—Nothing in this section shall be construed to impair the enforcement of section

223 of this title, chapter 71 (relating to obscenity) or 110 (relating to sexual exploitation of children) of Title 18, or any other Federal criminal statute.

(2) NO EFFECT ON INTELLECTUAL PROPERTY LAW.—Nothing in this section shall be construed to limit or expand any law pertaining to intellectual property.

(3) STATE LAW.—Nothing in this section shall be construed to prevent any State from enforcing any State law that is consistent with this section. No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section.

(4) NO EFFECT ON COMMUNICATIONS PRIVACY LAW.—Nothing in this section shall be construed to limit the application of the Electronic Communications Privacy Act of 1986 or any of the amendments made by such Act, or any similar State law.

(e) DEFINITIONS.—As used in this section:

(1) INTERNET.—The term "Internet" means the international computer network of both Federal and non-Federal interoperable packet switched data networks.

(2) INTERACTIVE COMPUTER SERVICE.—The term "interactive computer service" means any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions.

(3) INFORMATION CONTENT PROVIDER.—The term "information content provider" means any person or entity that is responsible, in whole or in part, for the creation or develop-

ment of information provided through the Internet or any other interactive computer service.

(4) ACCESS SOFTWARE PROVIDER.—The term "access software provider" means a provider of software (including client or server software), or enabling tools that do any one or more of the following:

(A) filter, screen, allow, or disallow content;

(B) pick, choose, analyze, or digest content; or

(C) transmit, receive, display, forward, cache, search, subset, organize, reorganize, or translate content.